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In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, Secretary of Energy,

Appellants.

v.

THE STATE OF MISSISSIPPI, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Brief of the Department of Energy of the State of Oregon, Amicus Curiae

DAVID FROHNMAYER
Attorney General
WILLIAM F. GARY
Solicitor General
Attorneys for Amicus Curiae
100 State Office Building
Salem, Oregon 97304
(503) 378-4402

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INTEREST OF AMICUS CURIAE

A major component of the State of Oregon's energy policy is to avoid dependency on large scale non-renewable conventional energy facilities. In order to meet its future energy needs, Oregon has decided to promote energy conservation and the development of renewable resources, including cogeneration and small-scale power production by the private sector.[1]

[1] Oregon's energy policy is codified in ORS 469.010:

"(1) Continued growth in demand for nonrenewable energy forms poses a serious and immediate, as well as future, problem. It is essential that future generations not be left a legacy of vanished or depleted resources, resulting in massive environmental, social and financial impact.

"(2) It is the goal of Oregon to promote the efficient use of energy

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In 1979 the Oregon Legislature established the Alternate Energy Development Commission to explicitly define methods of reaching the codified goals of the state's energy policy. The Commission was comprised of representatives of environmental groups, industry, citizens and local government. For a number of months, the Commission investigated the potential for and prominent obstacles to development of renewable energy resources such as solar energy, conservation, wind power, alcohol fuels, hydropower, geothermal energy, biomass, and cogeneration. The Commission made detailed recommendations for legislative action, most of which were incorporated by Governor Victor Atiyeh's special energy program which was submitted to the 1981 Legislature. *See* The Final Report of the Oregon Alternate Energy Development Commission, September, 1980. The 1981 Oregon Legislature has enacted 22 out of the 31 implementation bills submitted by the governor. HB 2247, for example, provides up to $40 million annually in tax

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resources and to develop permanently sustainable energy resources. The need exists for comprehensive state leadership in energy production, distribution and utilization. It is, therefore, the policy of Oregon:

"(a) That development and use of a diverse array of permanently sustainable energy resources be encouraged utilizing to the highest degree possible the private sector of our free enterprise system.

"(b) That through state government example and other effective communications, energy conservation and elimination of wasteful and uneconomical uses of energy and materials be promoted. This conservation must include, but not be limited to, resource recovery and materials recycling."

credits for businesses in Oregon which install energy conservation or renewable resource energy generation equipment.

In May of 1980, Oregon's voters approved a referendum creating a $350 million dollar small scale energy project low interest loan program. SJR 24, 1979, implemented by Oregon Laws 1979, ch 672. In June of 1981, the first major loan (for development of a 15 megawatt hydroelectric facility by the Warm Springs Indian Tribe) was made under this program.

In 1981, the Oregon agency responsible for the siting and regulation of energy facilities larger than 25 megawatts, the Energy Facility Siting Council, adopted a prospective standard consistent with Oregon's codified energy policy for determining the need for proposed energy facilities.[2] This standard provides in part that no large scale coal-fired conventional energy facility will be considered necessary in the State of Oregon until various predicted levels of energy, assumed to be available from existing conventional resources, cogeneration, and small-power producers, have been exhausted. The predicted levels of future power available in the standard, although somewhat more conservative, are based on the estimates of availability made by the Alternate Energy Development Commission.

[2] *See* ORS 469.010; Oregon Administrative Rule 345-111-025 (Need for Power) A-1.

The Public Utility Regulatory Policies Act of 1978, Pub. L. 95-617, 92 stat. 3117-3173, 16 USC §§ 2601 *et seq.,* (PURPA) is in many ways consistent with Oregon's energy policy. The Oregon Legislature has adopted measures which have implemented in Oregon law many of the provisions of PURPA. ORS 758.510-758.540 (Oregon Laws 1979, ch 730, as amended by Oregon Laws 1981, ch 714) require that Oregon utilities purchase, at on or above a minimum rate, the excess energy produced by a cogenerator or small-power producer, so long as certain operating and safety requirements are met. ORS 758.550 exempts cogenerators or small power producers from regulation by the State of Oregon as utilities.

PURPA, however, addresses certain impediments to small-power production and cogeneration which lie outside the ability of the State of Oregon to directly control. Most critical among these is the prospect that cogenerators and small-power producers would be subject to federal regulation as utilities if they engage in power production. The exemptions provided by § 210(e) of PURPA (16 USC 824a(e)) provide the Federal Energy Regulatory Commission with the statutory authority, among other powers, to waive otherwise applicable requirements of the Federal Power Act (16 USC 791a *et seq.*) and the Public Utility Holding Company Act (15 USC 79 *et seq.*). Without these ex-

emptions, the non-utility development of renewable resources, at least in Oregon, would be dealt a severe if not fatal blow. This would be a particularly serious loss to Oregon because of its large forest products industry and the potential and interest in that industry for developing cogeneration of electricity by recycling waste heat. In addition, new private enterprises which have been begun development of Oregon's hydropower and other renewable resource small power production potential would be severely and negatively affected. Consequently, the decision of the court below in striking down § 210(e) and other related sections of PURPA represents a significant barrier to fulfillment of Oregon's energy policy.

ARGUMENT

The Department of Energy of the State of Oregon joins in the arguments presented to the Court by the California Energy Resources Conservation and Development Commission.[3]

[3]The Department of Energy of the State of Oregon acknowledges that there are significant questions before the Court concerning the constitutionality of other sections of PURPA under the requirements of the Tenth Amendment. The Department of Energy takes no position in this brief, directly or by implication, on those questions.

CONCLUSION

For the reasons stated above, the decision of the United States District Court for the Southern District of Mississippi should be partially reversed and Section 210(e) of PURPA should be declared constitutional.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General
WILLIAM F. GARY
Solicitor General
Attorneys for Amicus Curiae

APPENDIX

OREGON ADMINISTRATIVE RULES
Chapter 345, Division 111—Energy Facility Siting Council

Need For Power

345-111-025 (1) In order to issue a site certificate for a biomass or fossil-fueled power plant the Council must find that:

(a) All the energy from that portion of the facility designated to serve Oregon customers will be demanded by customers in the applicants' combined Oregon service areas during at least one of the five years following the date the proposed facility is to be placed in-service. Demand shall be demonstrated by comparing firm demands with firm resources; and

(b) All the energy from that portion of the facility designated to serve non-Oregon customers will be demanded by customers in the applicants' combined non-Oregon service areas during at least one of the five years following the date the proposed facility is to be placed in-service. Demand shall be demonstrated by comparing firm demands with firm resources.

(c) The proposed facility's output shall be designated first by ownership shares and then by the allocation process in subsection (3)(a).

(2) Energy demand for the purposes of this standard will be calculated as follows:

(a) Demand in Oregon Service Areas:

(A) Applicants' firm demand in their Oregon service areas is rebuttably presumed to be their share of Oregon's energy demand (excluding Direct Service Industries served by the Bonneville Power Administration). The applicants' share of Oregon's energy demand is directly proportional to their share of Oregon loads averaged over the last 5 years for which data are available. Oregon's energy demand in 1979 is assumed to be 3,904 average MW and will increase at an annual rate of 3.8 percent through 1985, 2.4 percent from 1985 to 1990, 1.8 percent from 1990 to 1995, and 1.6 percent from 1955 to 2000.

(B) These Oregon energy demand values shall be increased by each applicant to include its historic system losses due to transmission, distribution and internal use. Applicants shall also reduce these demand values by the amount of conservation identified in subsection (2)(d).

(b) Demand in Non-Oregon Service Areas:

(A) Applicants' firm demand in their non-Oregon service

areas is rebuttably presumed to be as provided in demand forecasts utilized by the state(s) in which the applicants' non-Oregon service areas are located. If state forecasts are not available, non-Oregon demand is rebuttable presumed to be as provided in demand forecasts utilized by the applicants. The applicants' demand forecast must be provided with documentation of its methodologies and assumptions.

(B) These non-Oregon energy demand values shall be increased by each applicant to include its historic system losses due to transmission, distribution and internal use. Applicants shall also reduce these demand values by the amount of conservation resources projected for non-Oregon service areas.

(C) Conservation resources available in non-Oregon service areas are rebuttably presumed to constitute in each state in each forecast year resources equal to the same percentage of applicants' firm loads in that state as the resources listed in Table 2, Line 4 are to Oregon's total load. This presumption may be rebutted by showing that in any specific state a conservation resource included in Table 2 is available to a greater or lesser extent than presumed for non-Oregon service areas or has been projected in the forecasts used by the applicants.

(c) Determination of Applicants' Service Areas — In addition to the geographical territories which have historically constituted the services areas of the applicants, Oregon and non-Oregon services areas may include other distinct geographical areas continuously served by contract for firm energy for resale by applicants between 1975 and 1980 and as of January 1, 1981.

(d) Quantification of Conservation Resources — Conservation resources as used in subsection (2)(a) means the applicants' proportionate share, based on their share of Oregon loads averaged over the last five years for which data are available, of the energy savings shown in Table 2, Line 4. (Conservation resources include those efforts to reduce the amount of electricity which a utility must supply whether the effort is by using less electricity or use of renewable resources at the point of use.)

(3) Energy resources for the purpose of this standard will be calculated as follows:

(a) Resources for Applicants' Oregon Service Areas:

(A) Applicants' with Oregon service areas shall include as firm resources their share of existing, licensed, contract subsection (3)(c) and renewable resources subsection (3)(e) less any retirements.

(B) For applicants serving customers both inside and outside

Oregon existing, licensed, contract subsection (3)(c) and renewable resources subsections (3)(b) and (e) will be allocated to each state in each forecast year based on the state's share of the applicants' total forecasted demand (from subsection (2)(a) and (b) for that year.

(b) Resources for Applicants' Non-Oregon Service Areas:

(A) Applicants' with non-Oregon service areas shall include as firm resources their share of existing, licensed, contract subsection (3)(c) and renewable resources less any retirements.

(B) For applicants serving customers both inside and outside Oregon existing, licensed, contract and renewable resources will be allocated as in subsection (3)(a).

(C) Renewable resources available in non-Oregon service areas are rebuttably presumed to constitute in each state in each forecast year resources equal to the same percentage of applicants' firm loads in that state as the resources listed in Table 3 are to Oregon's total load. This presumption may be rebutted by showing that in any specific state a renewable resource included in Table 3 is available to a greater or lesser extent.

(c) Contract Resources for All Applicants — Applicants' resources shall include their contracts for firm energy allocated per subsections (3)(a) and (b), including but not limited to any share of the total Bonneville Power Administration (BPA) allocation to Oregon. It will be rebuttably presumed that any contracts with BPA expiring during the forecast period will be renewed with the same terms.

(d) Basis for Estimating the Average Energy Available from Resources — Applicants' firm resources will be evaluated as follows:

(A) Hydroelectric Plants: at critical water, as defined in Section 2, Part 1, of the **Agreement for Coordination of Operations Among Power Systems of the Pacific Northwest, Contract No. 14-02-9822.**

(B) Coal Plants: 70 percent annual capacity factor.

(C) Nuclear Plants: 70 percent annual capacity factor.

(D) Oil-fired and gas-fired plants existing as of September 1980: 25 percent annual capacity factor or as limited by permit.

(E) Oil-fired and gas-fired plants proposed after September 1980: 17 percent annual capacity factor.

(F) All others: as specified by contract or if not governed by a contract a documented estimate shall be used.

(e) Quantification of Renewable Resources — Renewable re-

sources as used in subsection (3)(a) means the applicants' proportionate share, based on their share of Oregon loads averaged over the last five years for which data are available, of the energy resources shown in Table 3. The magnitude of resources shown in Table 3 will be reduced by the amount of the proposed facility's output if that facility is of a type listed in Table 3.

(4) Exemptions from subsection (1)(b), Non-Oregon Needs — The Council will exempt applicants from subsection (1)(b) of this standard if Oregon will continue to be a net importer of electricity after construction of the proposed facility and at least 50 percent of the facility's net energy output is designated (per subsection (1)(c)) to serve Oregon customers. Projected net imports are shown in Table 1.

(5) Revisions — The projections made in this standard will be reviewed and brought up to date if necessary when the Council determines that new information warrants such change. Additionally, the EFSC will review these projections at least every two years and upon receipt of a Notice of Intent to file an application. The Council will also review numerical projections of this standard in a site certificate proceeding if a party proves that the projections or the data as applied to the applicants are incorrect.

TABLE 1
(345-111-025)

Oregon Net Imports of Electricity

Net Imports are defined as the difference between private and public utility resources dedicated to Oregon and the sum of the electrical energy producing resources wholly within Oregon's boundaries.

	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995
Utility Resources Dedicated to Oregon	3,753	3,849	3,989	4,135	4,096	4,066	4,030	4,015	3,995	3,976	3,958
Resources Within Oregon	1,910	1,910	1,910	1,910	1,910	1,910	1,910	1,910	1,910	1,910	1,910
Net Imports	1,843	1,939	2,079	2,225	2,186	2,156	2,120	2,105	2,085	2,066	2,043

TABLE 2
(345-111-025)

CONSERVATION PROGRAMS
(Average Megawatts)

1. **Residential**—Parats B through F are actions which will result in additional savings above that assumed in the Demand Forecast. Part A is the savings assumed in the Demand Forecast.

	85	86	87	88	89	90	91	92	93	94	95
A. Savings Assumed in Demand Forecast	32.0	44.0	49.0	54.0	59.0	64.0	70.0	76.0	82.0	88.0	94.0
B. Increased Retrofit Standards for DVA	3.5	4	4.5	5	5.5	6	6.5	7	7.5	8	8.5
C. Mandatory Weatherization in Portland	1.5	1.8	2.1	2.4	2.7	3	3.3	3.6	3.7	4.2	4.5
D. Expansion of Zero Percent Financing for Multi-Family Units	2.0	2.4	2.8	3.2	3.6	4	4.4	4.8	5.2	5.6	6
E. Hook-up Charge for New Electric Residences	0	0	0	0	0	0	0	0	0	0	0
F. Substitution of Gas Hot Water Heaters	14.0	17.0	20.0	22.0	25.0	28.0	29.0	31.0	32.0	34.0	35.0
2. **Commercial.** The following savings are assumed in the Demand Forecast	123	135	148	162	187	216	245	276	307	339	372
3. **Industry.** The following savings are assumed in the Demand Forecast	140.0	153.0	167.0	182.0	201.0	222.0	247.0	274.0	304.0	337.0	372.0
4. Total Conservation above that included in the Demand Forecast. (Parts 1B through F)	21.0	25.2	29.4	32.6	36.8	41.0	43.2	46.4	48.4	51.8	54.0
5. Total Conservation	316.0	357.2	393.4	435.6	483.8	544.0	605.2	672.4	741.4	815.8	892.0

TABLE 3
(345-111-025)

RENEWABLE RESOURCES
(Average Megawatts)

	85	86	87	88	89	90	81	92	93	94	95
1. Wind	4	6	8	10	15	20	25	30	35	40	45
2. Solar Electric*	0	0	1	1	1	1	1	1	1	1	1
3. Geothermal Electric	0	0	10	10	10	20	20	40	40	60	60
4. Co-generation and Biomass	50	60	70	80	90	100	110	120	130	140	150
5. Hydroelectrical	60	75	90	105	130	150	160	170	180	190	200
6. Geothermal Direct Use and Heating Districts	0	0	0	0	0	3	3	3	3	3	3
Total	114	141	179	206	246	294	319	364	389	434	459

*Values have been rounded to the nearest 1 MW. It is anticipated that 1 peak MW will be available in 1987 and 2 peak MW in 1990.

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